INDUSTRIAL PROPERTY MANAGEMENT SDN BHD v. FOREBASE PROPERTY SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAJA AHMAD MOHZANUDDIN SHAH JC
[CIVIL SUIT NO: WA-22NCvC-644-10-2020]
27 DECEMBER 2023

Abstract – *Even if a party has no contractual relationship with their neighbour, who could also be a complete stranger, they remain obligated to owe that neighbour a duty of care if their acts or omissions are transparently reasonable for the foreseeability of harm to that neighbour. As a result, a special proximity relationship between the parties occurred creating an obligation of care towards the harmed neighbour if evidence existed that this party's act caused the damage. A landowner is legally entitled to rely on the natural support provided by their neighbour's adjoining land to maintain the quiet and peaceful enjoyment of the land.*

TORT: *Negligence – Duty of care – Plaintiff's property damaged by works done on adjacent neighbouring land by defendants – Whether there was special proximity relationship between parties – Whether there was obligation of care towards harmed neighbour if evidence existed that a party's act caused damage – Whether defendants' acts amounted to withdrawal of natural right to support on part of plaintiff's property causing serious defects – Whether developer ought to be vicariously liable for wrongful acts committed by contractor – Whether defendants established defence of ex turpi causa non oritur actio – Whether defendants should be held jointly and severally liable – Whether claim for aggravated and exemplary damages allowed*

TORT: *Nuisance – Claim for damages – Plaintiff's property damaged by works done on adjacent neighbouring land by defendants – Whether there was special proximity relationship between parties – Whether there was obligation of care towards harmed neighbour if evidence existed that a party's act caused damage – Whether defendants' acts amounted to withdrawal of natural right to support on part of plaintiff's property causing serious defects – Whether defendants fully aware of damage to bungalow but did nothing to prevent further damage – Whether there was failure to exercise control over management of development of land – Whether defendants liable for nuisance caused by physical damage to plaintiff's property – Whether defendants established defence of ex turpi causa non oritur actio – Whether defendants should be held jointly and severally liable – Whether claim for aggravated and exemplary damages allowed*

The plaintiff initiated this civil action under the causes of action of negligence and nuisance against the defendants allegedly for all the damages caused to the plaintiff's property, a bungalow located on Lot 620 ('Lot 620') which was adjacent to its neighbouring land known as Lot 621 ('Lot 621'). According

to the plaintiff, the foundation and piling works of a 40-storey building on Lot 621 for a development named 'Hemmon House Project' were not performed according to the highest and/or expected standards. The first defendant was the developer of the Hemmon House Project. As part of the construction of the Hemmon House Project, the second defendant was appointed as the substructure contractor to do the foundation works generally known as to include excavation, drilling, piling and constructing the contiguous bored pile walls. In this regard, as per the letter of acceptance ('LOA') from the first defendant's civil and structural engineer, the second defendant was specifically appointed to perform the works as described in the LOA ('works'). The third defendant was the registered owner of Lot 621. Lot 620 and Lot 621 shared a common boundary. In relation to the Hemmon House Project, the third and the first defendants had executed a power of attorney ('PA') in which, amongst others, the third defendant had agreed to grant the first defendant the sole, absolute and exclusive rights to develop Lot 621 and sell all the properties that were built as the Hemmon House. In early September 2017, the plaintiff discovered that the bungalow suffered serious damage which included structural cracks and differential settlement. The plaintiff then notified the first and second defendants of such damage to its bungalow and invited them to provide a comprehensive incident report to fully explain the reasons for the damage as well as their professional opinion and assurance that the construction works would cause zero or only limited damage to the bungalow. It was alleged that as a result of some alleged failures of the second defendant to follow specific and acceptable excavation and piling techniques during the construction of the foundation works, there was some earth movement resulting from these works, ultimately resulting in the loss and withdrawal of the natural right of support to the plaintiff's land. Consequently, the bungalow was damaged due to unlawful interference with the plaintiff's use and enjoyment of the property. In light of this, the plaintiff claimed jointly and severally against all of the defendants for, amongst others, aggravated and exemplary damages as well as costs on a full indemnity basis. The issue that arose was whether the first, second and third defendants owed the plaintiff a duty of care in terms of negligence and nuisance.

Held (allowing plaintiff's claim in manner pronounced):

(1) Even if a party has no contractual relationship with their neighbour, who could also be a complete stranger, they remain obligated to owe that neighbour a duty of care if their acts or omissions are transparently reasonable for the foreseeability of harm to that neighbour. As a result, a special proximity relationship between the parties occurred creating an obligation of care towards the harmed neighbour if evidence existed that this party's act caused the damage. (para 30)

(2) The plaintiff was legally entitled to rely on the natural support provided by their neighbour's adjoining land to maintain the quiet and peaceful enjoyment of the land. This principle prevents a landowner from using their land as they please *carte blanche*. Besides being responsible for his own property, the landowner must also be responsible for that of his neighbours against foreseeable harm or damages in the sense that he should not do anything to his land that affects the safety of the neighbouring property. The landowner has a duty to protect his neighbour's land beyond his own boundaries. The landowner would be held accountable if his actions damaged his neighbour's land. Thus, the second defendant was under a duty of care not to allow such a situation to occur at the plaintiff's bungalow since their acts amounted to the withdrawal of the natural right to support on the part of the plaintiff's property, which appeared to have caused serious defects as a result of this. (para 31)

(3) The damage that was done to the plaintiff's bungalow was caused by the second defendant's negligence. The second defendant's failure to grout the contiguous bored piles wall properly and adequately when working on the piling works resulted in excessive soil displacement from Lot 620 to Lot 621.There were gaps between the contiguous bored piles which caused soil to be displaced. As a natural consequence of the second defendant's acts of wrongful conduct, the soil on Lot 620 had lost its stability. In the first place, the damage would not have occurred if reasonable skill and care were applied meticulously. Therefore, the second defendant failed to take all reasonable care when performing the works on Lot 621 which undoubtedly resulted in the bungalow's structural damage. (para 40)

(4) The plaintiff had sufficiently demonstrated that the damage first appeared in November 2017 at around the same time that the second defendant began the works. The bungalow was affected directly by the deep excavation and piling works that caused excessive settlement. Even though the first defendant asserted competence on the part of the second defendant in performing the piling activities, this did not negate the first defendant's liability. The first defendant was or ought to be vicariously liable for the wrongful acts committed by the second defendant. The plaintiff was initially unaware of or a complete stranger to any relationship between the first and second defendants. However, the damage to the bungalow created a special legal relationship between them all. (paras 47 & 48)

(5) Even though the acts and omissions were on the part of the second defendant, the first defendant owed a direct duty of care to the plaintiff. The second defendant could not solely be responsible for this duty of care, which was considered a strict liability. While it was unfortunate

A that the second defendant was negligent in their work, the neighbourhood principle required that a similar duty of care be imposed on the first defendant as well. The neighbourliness principle had further lodged a special relationship between the plaintiff and the first defendant. The plaintiff had successfully proven the serious
B consequences of the second defendant's negligent acts and omissions. This positive duty was, therefore, just and valid to be equally imposed upon the first defendant. Due to this, it was not possible for the first defendant to hide its liability from the second defendant's negligent workmanship. (para 49)

C **(6)** The first defendant, despite being aware of the damage caused by the second defendant's activities on Lot 621, did not take reasonable and urgent steps to rectify the situation. The first defendant had therefore breached its duty of care by failing to monitor, review and manage the second defendant's works. This was a situation where the non-delegable
D duty of care applies *vis-à-vis* the first defendant. As the nature of the works performed by the second defendant were inherently or extraordinarily hazardous, the first defendant could not escape liability by blaming the second defendant in isolation. (paras 51 & 52)

(7) The third defendant was fully aware of the damage to the bungalow but
E did nothing to prevent such further damage and allowed the works to proceed. As a result, the third defendant was estopped from denying knowledge of this damage. The third defendant was directly responsible for exercising control over the management and for making decisions related to the development of Lot 621 under the refreshed joint venture
F agreement which appeared to have been entered into after the dispute arose. To this end, the third defendant could no longer hide behind the curtain of another corporation as a means of escaping liability. The third defendant was therefore liable for nuisance caused by the physical damage to the plaintiff's property, along with the first and second
G defendants. The defendants failed to establish the defence of *ex turpi causa non oritur actio*.

(8) The defendants, despite knowing about the damage to the bungalow, did not stop the works to resolve the issue of reasonable rectification in a timely manner but continued to construct their piling works until the
H stop work order was issued. This alone qualified as an aggravating factor worthy of an award of this kind. Due to this, this court awarded RM250,000 in aggravated damages. The defendants' conduct in continuing works despite knowing the damage to the plaintiff's bungalow and the serious consequences of continuing the works clearly
I justified an award of exemplary damages. These conducts were taken to profit the defendants without regard to the plaintiff's right to use and enjoy such property. Therefore, an award of RM250,000 was awarded

as exemplary damages. The defendants should be held jointly and severally liable, rather than apportioned accordingly among them. (paras 63-66)

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors And Other Appeals [2003] 1 CLJ 585 CA ***(refd)***

Chin Fui Fong & Anor v. Wong Swee Kwoang & Ors [2019] CLJU 2102; [2019] 1 LNS 2102 HC ***(refd)***

Chin Lih Lih & Ors v. Sunrise Alliance Sdn Bhd & Anor [2011] CLJU 1069; [2011] 1 LNS 1069 HC ***(refd)***

Hemraj & Co Sdn Bhd v. Tenaga Nasional Bhd [2023] 1 CLJ 651 FC ***(refd)***

Hughes v. Percival [1881-85] All ER Rep 44 ***(refd)***

Kris Angsana Sdn Bhd v. Eu Sim Chuan & Anor [2007] 4 CLJ 293 CA ***(refd)***

M'Alister (Or Donoghue) (Pauper) v. Stevenson [1932] AC 562 ***(refd)***

Shabiru (1990) Sdn Bhd v. Goh Aik Chin & Anor [2019] CLJU 1380; [2019] 1 LNS 1380 HC ***(refd)***

Wong See Lee & Ors v. Ting Siik Lay [1997] 2 CLJ 205 FC ***(refd)***

Legislation referred to:

Companies Act 2016, s. 471

For the plaintiff - Chetan Jethwani, Goh Hui Ring & Naveenraj Rajendra; M/s Goh Partnership

For the 1st & 3rd defendants – Foo Joon Liang & Carissa How Chen Huey; M/s Gan & Partnership

For the 2nd defendant - Teo Jeng Yu & Teng Mun Wei; M/s Prem & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Raja Ahmad Mohzanuddin Shah JC:

Preliminary

[1] The construction and development of buildings, especially skyscrapers, are almost inevitable these days. Not only does this align with the status and symbol of developed nations, which is also an indicator of economic growth, but it also implies that developing nations are destined to become developed nations. With an ever-growing population, residential, office and hotel buildings have become increasingly in demand. This type of development is more likely to involve skyscrapers in many cities due to land shortages. It is also convenient living factors that push this development process along.

[2] Whenever it comes to building development, the highest standard of the construction process is crucial beyond words. The process of building development entails great responsibilities for developers and other parties involved. There can be no doubt that architects, engineers and contractors

must adhere to the highest level of skill and integrity. The goal is not only to ensure the safety of the development itself but also to ensure the safety of the surrounding land and properties.

A Brief Overview Of The Case

[3] The plaintiff before me initiated this civil action under the causes of action of negligence and nuisance against the defendants allegedly for all the damages caused to the plaintiff's property, a bungalow located on Lot 620 ("Lot 620"), which is adjacent to its neighbouring land known as Lot 621 ("Lot 621"). According to the plaintiff, the foundation and piling works of a 40-storey building on Lot 621 for a development named 'Hemmon House Project' were not performed according to the highest and/or expected standards. In light of this, the plaintiff is claiming jointly and severally against all of the defendants for, amongst others, special damages totalling RM3,818,511.21, general damages, aggravated and exemplary damages as well as costs on a full indemnity basis.

Issues To Be Tried

[4] A total of 19 main issues have been raised by the parties for trial. Some of these issues are interconnected, whereas others can be addressed automatically once the major issues are resolved.

[5] In regard to the dispute between the parties, what matters most to me is whether the defendants owe the plaintiff a duty of care and whether that duty has been breached. It also raises several other questions, such as whether the bungalow was damaged by the second defendant's works or if it was caused by a third party prior to the construction of the Hemmon House Project, namely the Tribeca project.

[6] In addition to determining whether the defendants are liable for nuisance as a result of such works interfering with the plaintiff's use and enjoyment of the property, the issue of the first defendant being vicariously liable for the act of the second defendant will also be determined. The issue of whether the duty of care owed by the first and third defendants can be delegated to the second defendant will also be attended to.

[7] At the end of the case, it appears that each party's counsel and their teams submitted detailed and comprehensive submissions that covered every aspect of the case.

Court's Analysis And Findings

[8] As to whether the first and second defendants owe a duty of care to the plaintiff and whether they breached the duty, it is first necessary to examine the relationship between the plaintiff and the first and second defendants, followed by the relationship between all the defendants.

[9] At the material time, the plaintiff was the registered owner of Lot 620, where a bungalow had been constructed on such land. The bungalow is situated on Imbi Street which is a major street in Kuala Lumpur located in the heart of Bukit Bintang. It is noteworthy that after this action has been brought in court, the plaintiff sold Lot 620 to Imbi Strada Sdn Bhd in March 2023 for RM16,500,000. This included the bungalow on the property. Back then, the bungalow was known as the 'House of Henry Goh'.

[10] In terms of the first defendant, it is the developer of the Hemmon House Project. As part of the construction of the Hemmon House Project, the second defendant was appointed as the substructure contractor to do the foundation works generally known as to include excavation, drilling, piling and constructing the contiguous bored pile walls.

[11] In this regard, as per the letter of acceptance dated 3 August 2017 ("LOA") from the first defendant's Civil & Structural Engineer, SNA Consult Sdn Bhd ("SNA"), the second defendant was specifically appointed to perform the works as described in the LOA known as "Site Clearance & Earthwork, Foundation, Earth Retaining Structure and Basement Structure Works for Cadangan Pembangunan 1 Blok Pangsapuri Servis 40 Tingkat (90 Unit) Yang Mengandungi 1 Tingkat Basement; 1 Tingkat Bawah Ruang Kommersial Bermezzanin; 13 Tingkat Podium Tempat Letak Kereta Serta Lift Kereta; 2 Tingkat Kemudahan Kelab Serta "Sky Garden"; 21 Tingkat Pangsapuri Dan 1 Tingkat Taman Bumbung Di Atas Lot 621, Seksyen 67, Bandaraya Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur." ("works").

[12] It is important to note that before the trial began, the second defendant was wound up by the Penang High Court on 20 April 2022. The plaintiff's leave application to continue the action against the second defendant under s. 471 of the Companies Act 2016 was dismissed by the Penang High Court. The Court of Appeal, however, allowed the plaintiff's appeal on 15 May 2023, which means that the second defendant is back in the picture.

[13] As for the third defendant, it is the registered owner of Lot 621. Lot 620 and Lot 621 share a common boundary. In relation to the Hemmon House Project, the third and the first defendants had executed a power of attorney dated 28 January 2016 ("PA") in which, amongst others, the third defendant had agreed to grant the first defendant the sole, absolute and exclusive rights to develop Lot 621 and sell all the properties that were built as the Hemmon House.

[14] In early September 2017, the plaintiff discovered that the bungalow suffered serious damage, which included structural cracks and differential settlement. Differential settlement refers to excessive ground movements. It further appears that the damage worsened in 2017 and 2018. As alleged by the plaintiff, the second defendant started the piling works on Lot 621 at or around the same time in 2017.

[15] The plaintiff then notified the first and second defendants of such damage to its bungalow by email dated 9 November 2017 and letters dated 10 November 2017, in which it attached several photos showing multiple wall cracks, concrete slab cracks, interior wall cracks, multiple floor cracks and ceiling detachment. The second and third defendants were therefore invited by the plaintiff to provide a comprehensive incident report to fully explain the reasons for the damage as well as their professional opinion and assurance that the construction works would cause zero or only limited damage to the bungalow.

[16] Now that I have examined the relationships between all the parties, I will examine the general law applicable to the core issues involving negligence and nuisance. As part of understanding the whole scenario, the court must examine what constitutes fundamental wrong in this case. Let's examine the plaintiff's claim generally at this stage, as to what caused the damage to its property.

[17] Here, the second defendant carried out foundation works including excavation, drilling, piling and constructing contiguous bored pile walls. This is undisputed. It was alleged that as a result of some alleged failures of the second defendant to follow specific and acceptable excavation and piling techniques during the construction of the foundation works, there was some earth movement resulting from these works, ultimately resulting in the loss and withdrawal of the natural right of support to the plaintiff's land. As a result, when the second defendant's works caused the earth movement, it caused the earth to move underground the bungalow, causing damage to the bungalow as its foundation could no longer be supported by stable and still earth. As a matter of fact, the bungalow almost split in two.

[18] As a result of understanding this, it is trite that causing damage to a neighbour's property constitutes an actionable wrong. The Malaysian court has recognised this longstanding principle and a comprehensive understanding of it is necessary to examine the general position governing this issue as outlined by the Federal Court in *Wong See Lee & Ors v. Ting Siik Lay* [1997] 2 CLJ 205; [1996] 2 MLRA 444, in which His Lordship Mohd Azmi FCJ clearly identified this issue as follows at p. 224 (CLJ); pp. 454 & 455 (MLRA):

> [35] As a matter of common-sense building retaining walls has become one of the bulwarks in the fight against soil erosion and in the preservation of soil to soil support enjoyed by neighbouring lands particularly where excavation activities have become necessary on one's property. This duty of care owed by landowners to their neighbours not to disturb or withdraw natural right to support, *ie*, soil to soil support, should no longer be questioned in this country as a cause of action in negligence and/or nuisance, where the breach of such duty has caused injury to the adjoining property.

[19] It is then necessary to comprehend how a litigant can successfully prove negligence by establishing the necessary legal elements. To this end, the case of *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors And Other Appeals* [2003] 1 CLJ 585; [2002] 2 MLRA 319 is relevant. His Lordship Gopal Sri Ram JCA's (as His Lordship then was) opinion on the issue is as follows at p. 600 (CLJ); p. 322 (MLRA):

> [15] To make out a case against a defendant in the tort of negligence, a plaintiff must establish four ingredients. First, he must show that he was owed a duty by the defendant to take reasonable care. Second, that the defendant breached that duty, third, that the resultant breach caused the harm in question and fourth that he (the plaintiff) suffered damage that is not too remote. There is a tendency on the part of some textbook writers (in the interest of tidiness) to treat each of these elements in watertight compartments. Such an approach may be quite misleading. This is because what a court trying an action for negligence is concerned with is the interpretation of a particular set of facts as establishing or negativing one or more of the ingredients of the tort. The speeches made in the House in *Woods v. Duncan* [1946] AC 401 illustrates the point.

[20] Next, for a specific guidance on how to identify the elements of private nuisance, His Lordship Harmindar Singh Dhaliwal JC (as His Lordship then was) referred explicitly to the following at pp. 36 and 37 in the judgment of the High Court in *Chin Lih Lih & Ors v. Sunrise Alliance Sdn Bhd & Anor* [2011] CLJU 1069; [2011] 1 LNS 1069; [2011] 11 MLRH 32:

> Nuisance Nuisance is defined as an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land, when it is private nuisance (see *Clerk & Lindsell on Torts* (18th Ed) at p. 973; *Sheikh Amir bin Salleh v. Chop Hup Seng* [1974] 1 MLRH 249; [1974] 2 MLJ 125; *Ong Koh Hou v. Perbadanan Bandar & Anor* at 621).
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> Unlike the case of public nuisance where the acts which constitute nuisance were unlawful acts, in private nuisance, the acts of the defendant are usually lawful. The tort of nuisance is a tort of strict liability in that it is no defence to say that the defendant took all reasonable care to prevent it. The conduct of such a defendant becomes a nuisance in three categories: a) by causing an encroachment on his neighbour's land, when it closely resembles trespass; b) by causing physical damage to his neighbour's land or building or works or vegetation upon it; or c) by unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land (see *Clerk & Lindsell on Torts* (18th Ed) at p. 976; *Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors* [2000] 1 MLRH 657; [2000] 4 MLJ 200; [2000] 4 CLJ 508; [2000] 3 AMR 3567).

[21] Taking these three cases into consideration, they serve as a specific and necessary guide for me to begin analysing the dispute between these parties.

[22] Reverting to the current dispute, the plaintiff claims that both the first and second defendants have been jointly and severally negligent towards the plaintiff in that the second defendant's construction works that started in September 2017 have caused damage to the plaintiff's bungalow. The plaintiff argues in this regard that the design of contiguous bore piles installed by the second defendant at the shared boundary between Lots 620 and 621 was wrong, unsuitable, inappropriate and did not meet the purpose of the intended construction. In addition, it has been alleged that the second defendant failed not only to construct and install the contiguous bore piles adequately and properly but also failed to adequately and properly carry out the grouting works on the gaps between the contiguous bore piles that had been previously installed.

[23] A further claim of the plaintiff is that as a result of negligence in properly carrying out the grouting works, substantial water flow and soil displacement had occurred from Lot 620 through the gaps in the contiguous bore piles, which in turn led to ground settlement at Lot 620, causing structural damage to the bungalow. In the plaintiff's view, failure to take sufficient precautions in constructing the works and designing the retention wall to protect Lot 620 from the works carried out on Lot 621 had caused damage to the bungalow.

[24] Further, the plaintiff claims that the first, second and third defendants are jointly and severally liable for the tort of nuisance resulting from similar activities. In spite of the fact that the first and second defendants were informed about the damage in November 2017, as well as the third defendant, who was equally aware of it, they all permitted such works to continue and did not take action to prevent the second defendant from engaging in such an act of nuisance that allegedly damaged the bungalow. Consequently, the bungalow was damaged due to unlawful interference with the plaintiff's use and enjoyment of the property.

[25] A breach of the first defendant's duty of care to the plaintiff has also been alleged as a consequence of the first defendant's failure to take sufficient care and precautions in monitoring, reviewing and managing the execution of the works by the second defendant, as well as the failure to take adequate precautions and care when designing and choosing the retention wall to protect the plaintiff's bungalow. Thus, the first defendant is also vicariously liable for the second defendant's acts and omissions.

[26] Following the identification of the above issues, I will begin by considering whether the first and second defendants owed the plaintiff a duty of care in terms of negligence.

[27] If I am to determine whether the first and second defendants owe the plaintiff a duty of care, it is necessary for me to examine the independent relationship between the plaintiff and the second defendant, who performed the relevant construction works on Lot 621 adjacent to the plaintiff's land,

followed by the relationship between the plaintiff and the first defendant being the main contractor, and finally, the relationship between the first defendant and the second defendant in order to establish a nexus to the plaintiff.

[28] Taking a look at the second defendant's position, I find that the concept of neighbourliness as articulated by Lord Atkin in *M'Alister (Or Donoghue) (Pauper) v. Stevenson* [1932] AC 562 (*Donoghue v. Stevenson* [1932] AC 562), is still very relevant in this current case. A *locus classicus* case such as this always provides great comfort in tracing back the origins behind why such a law was created in the first place. The concept of 'love thy neighbour' is a timeless principle that must always return to the elements of, amongst others, respecting your neighbour and protecting your neighbour from suffering harm as a result of actions that clearly fall within the control of another neighbour.

[29] His Lordship presented the concept of neighbourliness at p. 580 of his judgment in *Donoghue v. Stevenson* [1932] AC 562:

> At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[30] This concept holds that, even if a party has no contractual relationship with their neighbour, who could also be a complete stranger, they remain obligated to owe that neighbour a duty of care if their acts or omissions are transparently reasonable for the foreseeability of harm to that neighbour. As a result, a special proximity relationship between the parties occurs creating an obligation of care towards the harmed neighbour if evidence exists that this party's act caused the damage.

[31] As a result of analysing the facts of the case before me and applying the relevant law to those facts, I find that the second defendant owes a duty of care to the plaintiff in ensuring that whatever activities that were being conducted on Lot 621 would not interfere with the plaintiff's right to enjoy

his property peacefully and quietly. Using this concept, the plaintiff was legally entitled to rely on the natural support provided by their neighbour's adjoining land to maintain the quiet and peaceful enjoyment of the land. This principle prevents a landowner from using their land as they please *carte blanche*. Besides being responsible for his own property, the landowner must also be responsible for that of his neighbours against foreseeable harm or damages in the sense that he should not do anything to his land that affects the safety of the neighbouring property. The landowner has a duty to protect his neighbour's land beyond his own boundaries. The landowner will be held accountable if his actions damage his neighbour's land. Thus, in this particular case before me, the second defendant was under a duty of care not to allow such a situation to occur at the plaintiff's bungalow since their acts amounted to the withdrawal of the natural right to support on the part of the plaintiff's property, which appeared to have caused serious defects as a result of this. In this regard, I find that it is impossible to resolve this issue without imposing a duty of care on the second defendant.

[32] The same concept has been applied by His Lordship Lee Swee Seng J (as His Lordship then was) in *Shabiru (1990) Sdn Bhd v. Goh Aik Chin & Anor* [2019] CLJU 1380; [2019] 1 LNS 1380; [2019] MLRHU 1033:

> [20] It cannot be seriously disputed nor disputable that any works done on one's property must be done in such a manner as not to cause damage to neighbouring properties. The proximity of one's property to that of one's neighbour would attract the application of the proximity principle in *Donoghue v. Stevenson* [1932] AC 562.
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> [21] The enduring nature of the proximity principle can be seen in the way it has developed dynamically as courts when confronted each time with an accident or mishap under a myriad of circumstances where injury or even death has been caused arising out of human conduct, have applied the "duty of care test" flexibly as the justice of the case may demand. The *dicta* below rings true in that whilst circumstances in life may change the guiding principle enunciated in the case may be applied across a broad spectrum of anticipated accidents. It was said that Lord Atkin's enunciation of the "neighbour principle" had been inspired from the question asked by a wise teacher in the parable of the Good Samaritan. The same question is being asked today as follows as set out in the case of *Donoghue v. Stevenson* (*supra*) ...
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> [22] I have no difficulty in holding, as the trial court had held, that D3 owed a duty of care in carrying out the construction works to the property of the defendants owners in such a manner as not to cause damage to the plaintiffs' adjacent and adjoining property.

[33] Similarly, the Court of Appeal in *Kris Angsana Sdn Bhd v. Eu Sim Chuan & Anor* [2007] 4 CLJ 293; [2007] 5 MLJ 13 applied the same concept in securing liability against the appellant for the piling works that caused damage to the respondent's land. The Court of Appeal found these works

were deemed foreseeable and likely to occur. In the Court of Appeal's judgment, His Lordship Suriyadi Halim Omar JCA (as His Lordship then was) noted the following at pp. 309 to 310 (CLJ); pp. 22 and 23 (MLJ): A

> [22] Despite the complaints by the respondents, and despite the obvious damages befalling the property, the appellant had continued with its activities. Even a neighbour had a taste of the appellant's nonchalance. As early as 17 January 1997 DBKL had occasion to order the appellant to cease all construction activities due to the damages suffered by that neighbour (a bungalow owned by the Government of Sabah). Again on 14 August 1997 the DBKL had informed the appellant of complaints having been received and had requested the appellant to cooperate by sending to it a report of the latest development. The cavalier attitude of the appellant again met the wrath of DBKL when in April 1998, it was ordered to stop that impugned construction activities, based on similar grounds. By then it was too late ... B C
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> [23] Needless to say, we were satisfied that the construction works carried out by the appellant had been the direct cause of the damages befalling the property. It was also our finding that not only was the construction the cause of the damage to the property but that the appellant never took any form of precautionary or preventive steps before commencing the activities. D
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> [24] We were satisfied that the respondents had established negligence on the part of the appellant, and due to that negligence, the respondents' property had suffered irreparable damages and hence beyond habitation. The appellant had omitted to do something which any reasonable man in that situation would have done to avoid the respondents' sufferings. But the law is such that mere negligence by itself, regardless of the losses suffered by an aggrieved party, will not suffice to pin down a wrongdoer. A wrongdoer is only liable in negligence if he is under a legal duty to take care. That injury to the aggrieved party, or time immemorial referred to as the neighbour, must be foreseeable, and likely to happen. E F
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> [26] Needless to say from the set of facts, the respondents were the appellant's physical neighbour, and certainly would have been affected by its actions. Further, from the evidence, the damages befalling the property as a consequence of the acts, in this case, construction activities, without any preventive actions undertaken, from a reasonable man's perspective not only was foreseeable but likely to occur. As per the set of facts before us, only an unreasonable neighbour would care to state that such serious injury to the property was unforeseeable and that it was unlikely to occur. G H

[34] His Lordship Suriyadi Halim Omar JCA (as His Lordship then was) further observed the following at pp. 24 and 25 in rejecting the argument that the piling and excavation works were part of the appellant's natural and ordinary use of its own land and therefore exonerated the appellant of any responsibility: I

A [29] The last legal issue canvassed by the appellant was the position of the English common law in relation to piling and excavation works on its own land as enunciated in *Acton v. Blundell and another*. The appellant had submitted that it was part of Malaysian common law, and that being so it had absolved the appellants from liability for a natural and ordinary use of its own land. In brief the appellant had submitted that the principle that
B emanated from the above case was an absolute defence.

[36] With respect to the archaic view of *Acton v. Blundell* the realities of modern life must not be discounted. High density of population in popular residential areas in Malaysia is now the norm. Houses may have to be built very close to each other, at times on hilltops, or even hugging
C those slopes. To allow the incoming new house owner or contractor to take away the ground support of adjacent buildings, justifying such acts on natural user of his land, and thereafter blaming gravity and soil subsidence (or de-watering) as an operation of the laws of nature, is not in sync with reality. We are no more a society that lives miles apart like the olden days, but in one where a sneeze is never out of the neighbour's
D earshot; and where likewise unreasonable activities may touch the life of a neighbour. To deny the rights of neighbours, and allow a wrongdoer to wreak havoc and heartache, would militate against the very fabric of modern life and collective ideology of a multifaceted society. In a nutshell the case of *Acton v. Blundell* would be out of keeping with the current existing law of torts. As it stands, if no reasonable steps were undertaken
E by the wrongdoer to ensure that no damages would befall the neighbours, and did indeed suffer them, an actionable tort of negligence may await him.

[37] To wind up the issue of liability we therefore reject the rule propounded in *Acton v. Blundell* ...

F **[35]** Similarly, in another judgment by the High Court in *Chin Fui Fong & Anor v. Wong Swee Kwoang & Ors* [2019] CLJU 2102; [2019] 1 LNS 2102; [2019] MLJU 1878, His Lordship Wong Kian Kheong J (as His Lordship then was) found that there was sufficient physical proximity between the construction contractor and the landowner. The observations of His
G Lordship were as follows:

[42] In respect of the 1st Element regarding the 2nd Defendant, the SC's Judgment can be easily affirmed. It is clear that any person carrying out construction work on a piece of land, owes a duty under Malaysian case law to take all reasonable care that the construction work does not cause
H damage to the structures and buildings on neighbouring land, especially the adjoining land (2nd Defendant's Duty Of Care). There is sufficient legal proximity between the Plaintiffs and 2nd Defendant because it is reasonably foreseeable that damage will be caused to the Plaintiffs' Bungalow if the 2nd Defendant has employed the wrong piling method. The sufficient physical proximity between the Plaintiffs (the immediate
I neighbor of the 1st Defendant's Land) and the 2nd Defendant's Piling Work cannot be denied in this case.

If there is no sufficient legal proximity between the Plaintiffs and 2nd Defendant, this will give an unjustifiable *carte blanche* to a contractor to carry out construction work on a piece of land in any manner as the contractor wishes.

Lastly, there is no policy consideration in this case to militate against the imposition of the 2nd Defendant's Duty Of Care.

[36] At this juncture, the above paragraph provides the basis for tying up the first defendant's liability towards the plaintiff, along with some other factual and legal circumstances that I will discuss in my next issue below.

[37] As a next step, I will determine whether the second defendant breached its duty of care towards the plaintiff.

[38] This issue requires me to examine PW5's opinion as an expert engineer witness. In this regard, he found that a failure of the second defendant's type of system resulted in excessive settlement on the construction site that caused the bungalow to collapse and crack nearly half of it. Further, he claims that the second defendant's retaining wall system failed because it did not retain the soil behind what was supposed to be the wall, resulting in water and soil coming out through it. Thus, the soil underneath the bungalow moved simultaneously, affecting its stability.

[39] In terms of technical construction, according to PW5, there were gaps between the contiguous bored piles. For clarity, a contiguous bored pile system is a type of retaining wall consisting of concrete bored piles installed around the excavation works in a linear configuration with spacing between each of them for the purpose of retaining the structure so that no earth gets into the excavated area. It is different from another method called secant pile, which closes the gap between the piles to form a continuous wall without a gap for water to escape. As a result, the problem was caused by contagious bored piles with gaps between them, so they were not retaining water.

[40] In this regard, I cannot help but agree with the expert witness of the plaintiff that the damage that was done to the plaintiff's bungalow was caused by the second defendant's negligence. In my opinion, the second defendant's failure to grout the contiguous bored piles wall properly and adequately when working on the piling works resulted in excessive soil displacement from Lot 620 to Lot 621. Regarding this aspect, there were gaps between the contiguous bored piles which caused soil to be displaced. As a natural consequence of the second defendant's such acts of wrongful conduct, the soil on Lot 620 had lost its stability. In the first place, the damage would not have occurred if reasonable skill and care were applied meticulously. I, therefore, find that the second defendant failed to take all reasonable care when performing the works on Lot 621 which undoubtedly resulted in the bungalow's structural damage.

[41] On the issue of causation, I find that the plaintiff has sufficiently demonstrated that the damage first appeared in November 2017, at around the same time that the second defendant began the works. The bungalow was affected directly by the deep excavation and piling works that caused excessive settlement. In addition, PW6 from SNA Consult Sdn Bhd, who was the structural and civil engineer that the first defendant appointed, confirmed that the bungalow was damaged owing to the soil in the form of water and sand exiting from Lot 620 through the gaps of the contiguous bored piles wall due to the second defendant not properly grouting the gaps between the contiguous bored pile wall while constructing the basement wall which eventually undermined the bungalow's foundation. The important thing to note here is that PW6 is the plaintiff's subpoena witness. Since PW6 himself was appointed by the first defendant as its structural and civil engineer consultant, I have no reason to doubt him.

[42] As further support for this finding, the second defendant did not take any proactive steps to defend the claim. Instead, it adopted the cross-examinations of the first and third defendants. This indicates that the second defendant acknowledges the damage caused by them to the bungalow, in accordance with the views and stands of the first and third defendants. This obviously contradicts the defence of the second defendant that the plaintiff, as well as the Tribeca Project, caused the damage. In addition, no witnesses were called by the second defendant, nor were any plaintiff's witnesses cross-examined by it. As a consequence, I agree that the second defendant has abandoned their defence, which means that they cannot now take the same stand again as in their defence. It is further supported by the fact that the second defendant was involved in all aspects of the dispute involving Lot 620.

[43] As for the alleged damage to the bungalow caused by another neighbouring third-party development, I accept that there were some minor defects. However, it is no longer substantial and irrelevant because of the following facts.

[44] It is worth noting that Tribeca's construction works have been completed at the time of that material event. Between the fact that the damage was caused by the second defendant on the one hand and the fact that it could have been caused by the "development of Tribeca on the other hand, I conclude that Tribeca's damage was only limited to non-structural damages that had been fully rectified by December 2017. The most critical evidence is that PW6 further rejected the notion that Tribeca was at fault, effectively putting an end to this issue.

[45] At this point, I would like to highlight that both parties communicated during the early stages of the dispute. It is not like the defendants have been incommunicado. There were letters, emails and meetings between the

parties. Aside from this, however, the second defendant did nothing at any point in time to stop the works. This resulted in further damage to the bungalow. In this case, settlement markers were placed at Lot 620, but they were only used as soil settlement indicators rather than as rectification works. As a follow-up, the second defendant proposed demolishing part of the building in order to remedy the damage. However, in light of the extent of the damage and safety concerns, I accepted the finding that the second defendant's proposal to demolish only a part of the building was not practical. In any case, the plaintiff has the right to wait to decide on the rectification issue until the case is concluded, as the matter has at that time been filed in court.

[46] Getting back to negligence involving the first defendant, the plaintiff is not affected by its failure to challenge the competency of the second defendant, as opposed to the argument of the first defendant that requires the plaintiff to rebut objective evidence showing the second defendant's competency as a specialist in the excavation and piling works. Despite the fact that the first defendant expressed the opinion that the second defendant was a well-known name in the piling foundation business, which was also testified to by PW6, the facts presented to me show that there was still negligence on the second defendant's part when conducting the piling activities, which eventually caused the bungalow to be damaged. The evidence points to this, including PW6's testimony.

[47] On this basis, the factual circumstances surrounding this case and the legal position regarding the relationship between the second defendant and the first defendant reveal that the first defendant is or ought to be vicariously liable for the wrongful acts committed by the second defendant. Even though the first defendant asserts competence on the part of the second defendant in performing the piling activities, this does not negate the first defendant's liability. In the first instance, it is not the plaintiff's responsibility to provide reasons why the first defendant should not have appointed the second defendant as proposed by the first defendant in its argument. As of that point, the relationship was limited to the first and second defendants only.

[48] To this end, the plaintiff was initially unaware of or a complete stranger to any relationship between the first and second defendants. However, the damage to the bungalow created a special legal relationship between them all. It appears that this is also the general basis for the cases highlighted above.

[49] Concerning this, even though the acts and omissions were on the part of the second defendant, I find that the first defendant owes a direct duty of care to the plaintiff. In other words, the second defendant cannot solely be responsible for this duty of care, which I would consider a strict liability. While it is unfortunate that the second defendant was negligent in their work, the neighbourhood principle requires that a similar duty of care be imposed

on the first defendant as well. In addition, I would opine that the neighbourliness principle has further forged a special relationship between the plaintiff and the first defendant. Taking the facts of this case into comparison with those in *Hemraj & Co Sdn Bhd v. Tenaga Nasional Bhd* [2023] 1 CLJ 651; [2023] 1 MLJ 785, I find that this case before me differs from the decision of the Federal Court. In my opinion, excavation works have always had the potential to cause serious damage to adjacent land, which is why I am not comforted by the fact that it was only carried out as part of the second defendant's every day operations. The existence of an alternative design further indicates that care must be taken in choosing the safest option. Moreover, the facts are so clear that I believe the plaintiff has successfully proven the serious consequences of the second defendant's negligent acts and omissions. This positive duty is, therefore, just and valid to be equally imposed upon the first defendant. Due to this, it is not possible for the first defendant to hide its liability from the second defendant's negligent workmanship. Clearly, such negligence works by the second defendant caused the defects.

[50] I am also aware that the first defendant, despite strenuously denying liability and taking the position that the damage to the bungalow was not the result of the second defendant's actions, has shifted its position in accepting the evidence by DW6 on the second defendant's failure and further arguing that the plaintiff's bungalow suffered damage as a result of the second defendant's workmanship failure. Consequently, the first defendant is no longer able to rely on their defence, and all other issues raised in their defence should also be viewed with suspicion, if not rejected outright. In this situation, the first defendant had no ground to stand on.

[51] It is also imperative to note that the first defendant, despite being aware of the damage caused by the second defendant's activities on Lot 621, did not take reasonable and urgent steps to rectify the situation. The first defendant has, therefore, breached its duty of care by failing to monitor, review and manage the second defendant's works.

[52] Whatever the case, this is a situation where the non-delegable duty of care applies *vis-à-vis* the first defendant. As the nature of the works performed by the second defendant were inherently or extraordinarily hazardous, the first defendant cannot escape liability by blaming the second defendant in isolation. I am guided in my finding by *Hughes v. Percival* [1881-85] All ER Rep 44 where Lord Blackburn observed as follows at p. 46:

> The first point to be considered is: What was the relation in which the defendant stood to the plaintiff? It was admitted that the parties were owners of adjoining houses between which was a party wall, the property of both. The defendant pulled down his house and had it re-built on a plan which involved in it the tying together of the new building and the party wall which was between the plaintiff's house and the defendant's,

> so that if one fell the other would be damaged. The defendant had a right so to utilise the party wall, for it was his property as well as the plaintiff's; a stranger would not have had such a right. But I think the law cast upon the defendant, when exercising this right, a duty towards the plaintiff. I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it, but I think that the duty went so far as to require him to see that reasonable skill and care were exercised in those operations which involved a use of the party wall, exposing it to this risk. If such a duty were cast upon the defendant he could not get rid of the responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself, and, if they so agreed together, to take an indemnity to himself in case of mischief coming from that person not fulfilling the duty which the law cast upon the defendant; but the defendant still remained subject to that duty and liable for the consequences if it was not fulfilled.

[53] In view of the above findings, I find no basis for the first defendant's attempt to escape its liability by segregating the dispute into two timestamp stages, the first being before the damage occurred and the second being after the damage had occurred. With regard to this, it has been alleged that during period (1), the plaintiff must prove that the first and second defendants caused the nuisance that resulted in the damage, while during period (2), the first and third defendants were negligent and caused nuisance that resulted in the bungalow's condition deteriorating. As I have analysed above, I find that not only have these elements not been pleaded but that all the damage is the result of a single transaction. There is no difference in the plaintiff's claim based on these distinctions. Based on the testimony of the relevant witnesses, the second defendant's work caused the bungalow's damage.

[54] As regards to the position of the third defendant, I believe they have also abandoned their stand taken in the defence, similar to the first defendant. Instead of defending their denial of causation, they now claim that the damage was indeed caused by the works of the second defendant. As a result, the third defendant is liable for breach of duty of care under nuisance apart from the first and second defendants.

[55] Moreover, it is reasonable to infer that the third defendant was fully aware of the damage to the bungalow but did nothing to prevent such further damage and allowed the works to proceed. In this aspect and specifically based on the factual circumstances surrounding this case, I am in agreement with the plaintiff's argument that, since there is a common director between the first and third defendants, knowledge of DW3 as a director of the first defendant can be imputed to the third defendant. This was also agreed to by DW3 himself, apart from the fact that he was aware of this issue as early as November 2017 but did nothing about it. As a result, the third defendant is estopped from denying knowledge of this damage. Additionally, I find that

the third defendant was directly responsible for exercising control over the management and for making decisions related to the development of Lot 621 under the refreshed joint venture agreement dated 1 November 2018 which appears to have been entered into after the dispute arose.

[56] To this end, the third defendant can no longer hide behind the curtain of another corporation as a means of escaping liability based on these facts. As a result of analysing the above position along with the legal position pertaining to this fact, I conclude that the third defendant is liable for nuisance caused by the physical damage to the plaintiff's property, along with the first and second defendants. This is further reinforced by DW3's testimony, which acknowledged that the third defendant was responsible for making sure the neighbour's property was not damaged. The third defendant clearly foreseeable this.

[57] In addition, there is one more issue about the witnesses of the first defendant that needs to be addressed. I find that DW1, being the first defendant's expert engineer, unreasonably withheld himself from answering some basic or simple questions, including his own conclusion, despite making a finding that the damage was caused by excessive settlement recorded at the bungalow's back portion, the settlement of which had caused severe cracks and separation between the original building and the additions or extensions to the main building. In addition, I find that his testimony failed to assist me in identifying the relevant issues before the court contrary to the purpose for which he was called to testify, which was to provide me with expert assistance independently. Regarding DW3 and DW4 (the first defendant's factual witnesses), I did not find their testimony to be so absurd that it affected their credibility, as claimed by the plaintiff. No necessity exists for me to reject their entire testimony.

[58] Considering the factors outlined above, I conclude that the defendants have failed to establish the defence of *ex turpi causa non oritur actio*.

[59] Following my findings above, I will now address the plaintiff's claims in light of the relief they seek. Regarding the costs incurred in hiring expert consultants to provide engineering advice, conduct the geotechnical and structural assessments of the bungalow, conduct the soil assessment and instrumentation testing as well as an independent valuer to provide the plaintiff with the value of the bungalow all amounting to RM219,133, I am satisfied that the plaintiff has sufficiently demonstrated these costs with the relevant invoices. Moreover, not only do I further find that these appointments were justifiable and reasonable resulting from the circumstances of the case, but I also find that there has been a lack of challenge by the defendants on these payments. In addition, the first and third defendants themselves acknowledge that the second defendant caused the damage to the bungalow, further justifying the plaintiff's engagement of those services.

[60] In regard to the alleged loss of rental between October 2017 and March 2023 for the sum of RM3.3 million, I find that the plaintiff must still demonstrate that there was in existence of a potential tenant but the potential tenant could not rent the bungalow because of the damage. I believe that repeatedly informing the defendants that the bungalow could not be rented as a result of the damage sustained is not sufficient to entitle the plaintiff to compensation for the loss of rental income. A claim based on predictability without proof cannot be justified. Further, I find that DW2's evidence does not indicate that an offer to rent the bungalow for RM50,000 per month was on the table. On this specific issue, DW2 was subpoenaed by the first defendant as a witness. He was interested in renting the bungalow since he owned a restaurant. PW2, the plaintiff's representative, testified earlier that DW2 had indicated to her his interest in renting for RM50,000. However, DW2 testified that he did not proceed with the tenancy because RM50,000 per month was such a high amount. As a matter of legal principle, I do not deny that this claim for rental is available to the plaintiff if sufficiently proved. However, based on my previous finding, I am not able to find sufficient evidence to support this claim.

[61] As further evidence of this finding, the rectification works associated with Tribeca's damage were still being carried out by Bauer up until December 2017. It is, therefore, unlikely that the bungalow was ready for rent in October 2017.

[62] I will now examine the costs associated with security guards. Upon reviewing the claim for security guard expenses incurred between October 2017 and March 2023, I find that in addition to the necessity of hiring security guards to secure the damaged and unoccupied bungalow, I also find that the plaintiff has provided sufficient evidence to support the RM299,378.31 amount claimed. The first and third defendants argue that based on the security company's invoices produced by the plaintiff, these claims include another different property. On this issue, I believe that the plaintiff does not appear to have considered the costs of that additional irrelevant property when computing the exact security guard charges. They appear to have already been deducted from the plaintiff's current claim.

[63] As to the claim for aggravated damages, I find that the defendants, despite knowing about the damage to the bungalow as early as November 2017, did not stop the works to resolve the issue of reasonable rectification in a timely manner but continued to construct their piling works until the stop work order was issued. In my opinion, this alone qualifies as an aggravating factor worthy of an award of this kind. Further support for this can be found in the fact that all defendants took a different stance during the trial compared to what they pleaded in their defences. In the event that this stand had been taken earlier, the issues might have been resolved much sooner and perhaps without the need to go to court. Due to all these factors, I award only RM250,000 in aggravated damages.

[64] As for exemplary damages, after considering the same factors as under the claim for aggravated damages, I conclude that the defendants' conduct in continuing the works despite knowing the damage to the plaintiff's bungalow and the serious consequences of continuing the works clearly justifies an award of exemplary damages. It is particularly pertinent when it also appears to the court that these conducts were taken to profit the defendants without regard to the plaintiff's right to use and enjoy such property. I therefore award RM250,000 as exemplary damages.

[65] In awarding the sums of RM250,000 each for aggravated and exemplary damages as opposed to RM1 million each as claimed by the plaintiff, I have also taken into consideration the fact that the bungalow has also been recently sold for RM16.5 million and therefore no longer remains a liability to the plaintiff. In addition, I do not grant general damages for the same reason.

[66] Further, I believe that based on the facts surrounding this case, the defendants should be held jointly and severally liable, rather than apportioned accordingly among them as suggested by the first and third defendants. All of them appear to be aware of the bungalow's defects, but no immediate action seems to have been taken. The timeline of the project's development seems to be of critical importance to them.

Conclusion

[67] In light of the above, I am only allowing the plaintiff's claims in the manner just recently pronounced.

[68] Judgment sums are subject to interest at the rate of 5% per annum from the date of judgment until full payment is made.

[69] As regards costs, RM100,000 is awarded to the plaintiff as costs against the first and third defendants. The plaintiff is awarded RM10,000 in costs against the second defendant. Other than putting its own closing arguments, the second defendant did not actively participate in the trial. I am not imposing costs on an indemnity basis.

[70] Furthermore, I am also allowing RM15,000 in costs payable by the second defendant involving the plaintiff's leave application to proceed with the action against the second defendant, who was wound up by the Penang High Court, and the appeal to the Court of Appeal against the decision of the Penang High Court in refusing leave to proceed with the action.

[71] All costs are subject to allocatur.